

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma,)	
)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:05-cv-00329-GKF-PJC
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS' JOINT MOTION TO STRIKE
PORTIONS OF PLAINTIFFS' DAMAGES EXPERTS' REPORT
AND INTEGRATED BRIEF**

Defendants respectfully move the Court to strike from Plaintiffs' January 2009 damages experts' disclosures any and all results, opinions, and conclusions based on representations or assumptions about proposals for alum treatments¹ of Lake Tenkiller or any portion of the IRW, including but not limited to the Contingent Valuation ("CV") survey portion of the Stratus Consulting report, and offer this integrated brief in support.

Plaintiffs' proposed alum treatment is untimely. Expert opinions regarding remedial alternatives were due to be served on Defendants no later than May 15, 2008. (Mar. 27, 2008 Ord. at 2: Dkt. No. 1658.) As the Court made clear, this deadline included all expert opinion as to remedial alternatives, even those that would serve as the basis for subsequently served expert opinions pertaining to damages. (Jan. 15, 2008 Ord. at 2: Dkt. No. 1459.) Far from disclosing any opinion supporting a damages estimation based on the use of alum to treat fields and/or waters in the IRW, the remedial report Plaintiffs served on May 15, 2008 expressly rejected the use of alum specifically because of its unproven effectiveness, its potential to damage aquatic ecosystems, and its toxicity to both plant and fish life. (King R. at 12, 16, 19: Dkt. No. 1876-16.) Nevertheless, in January 2009, Plaintiffs served expert damages reports seeking \$ 610 million in damages calculated based on a proposed program to remediate the IRW with alum. (See Desvousges Decl. ¶ 11: Dkt. No. 1854-5.)

Plaintiffs' reports are ambiguous as to whether this proposed program is real or hypothetical. If the former, the Court should reject this effort to introduce through the backdoor an unsupported, undemonstrated, and untimely remedial alternative. Alternatively, if Plaintiffs' proposed alum treatment program is purely hypothetical, then Plaintiffs' experts' valuations lack

¹ The term "alum" generally refers to aluminum sulfate compounds. See Hawley's Condensed Chemical Dictionary at 45 (14th ed. 2001).

any basis in science or in the record, and fail under Daubert. Finally, even if Plaintiffs' January 2009 disclosures had been timely, they are indisputably incomplete under Rule 26(a)(2), and should be stricken on that ground as well.

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Unsuccessful Efforts to Alter the Expert Disclosure Definitions

During the course of discovery the Court has made clear several times that opinions regarding remedial alternatives such as a proposed alum treatment program were due with Plaintiffs' non-damages expert reports, not with their later damages expert reports. The Court set the deadline for Plaintiffs to disclose the identities, opinions, and supporting materials of their testifying experts on damages issues for January 5, 2009. (Nov. 15, 2007 Ord. at 2: Dkt. No. 1376.) During the pretrial proceedings in this case, Plaintiffs sought three times to change the Court's designation of the deadline for disclosure of "damages experts" to a deadline for disclosure of "relief-related experts." The Court rejected all three attempts.

Plaintiffs' first attempt occurred in their Response to the Cargill Defendants' Motion for Modification of Scheduling Order. (Dkt. No. 1322.) In the context of discussing proposed changes to the litigation schedule, Plaintiffs suggested that the Court's Scheduling Order was "ambiguous in the manner in which it distinguishes between expert reports on matters pertaining to relief versus expert reports pertaining to all other matters besides relief" and urged the Court to change the "damages" expert deadlines to "relief" expert deadlines. (*Id.* at 12-13 & n.10.) At the hearing on the motion, Plaintiffs' attorney argued that the requested change in the names of the expert reports was:

trying to get at is that in the first phase of experts, what we would submit is our -- the causation piece and the injuries ... the basics of fate and transport, the basics of ... what injuries have resulted from this contamination.

The second phase would be looking at damages and remedies. Damages are not, as the Court is well aware, a stand alone piece. Damages change according to how you design the remedies. And you can't really begin designing the remedies until you know what the injuries are. And so, it doesn't really make sense, that is unless you're a defendant and you want to be sure that plaintiff doesn't have a chance to really look at the injuries and then design a remedy, to say you're going to do the remedies at the same time that you do the injuries. Until you get the injuries you really can't start on the remedy work.

(Nov. 6, 2007 Hrg. Tr.: Dkt. No. 1387 at 195:5-21.) The Court denied Plaintiffs' request and retained the "Plaintiffs' Expert Report on Damages" language in the Amended Scheduling Order. (Nov. 15, 2008 Ord. at 2: Dkt. No. 1376.)

Plaintiffs sought reconsideration of the issue from Magistrate Judge Joyner, claiming that the issue had been ignored the first time around and repeating many of the same arguments. (Dkt. Nos. 1386, 1432.) Defendants opposed the motion, expressing concern over possible delays in the production of scientific information critical to liability issues until a later "relief" deadline:

Of particular concern in considering Plaintiffs' proposed "relief-related" regime is the possibility that Plaintiffs would try to produce a CERCLA remediation plan or a natural resource damages ("NRD") assessment only at the second expert deadline, claiming that the plan or assessment was "relief-related" and leaving Defendants only two months to respond.

(Defs.' Resp. in Opp'n to Pls.' Mot. to Reconsider Am. Sched. Ord. at 6: Dkt. No. 1422).

The Court again rejected Plaintiffs' request to change the language of the deadlines, stating:

More importantly, the Court finds no substantive reason to grant the request. The Court understands State's arguments for a natural demarcation between relief and causation issues. However, it is equally true that much of the expert work regarding causation will be integrally involved with remediation options. This case was filed June 13, 2005. *State's experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the currently deadline of April 1, 2008 for Plaintiff.* It is the Court's intention that the very focused area of monetary damages is reserved for the second deadline. Otherwise, unnecessary delay could occur.

(Jan. 15, 2008 Ord. at 2: Dkt. No. 1459, emphasis added.)

Plaintiffs objected to the Magistrate Judge's decision as "clearly erroneous" and appealed to Judge Frizzell to modify the "damages expert" language. (Dkt. Nos. 1470, 1536.) Judge Frizzell summarily denied the objection. (Mar. 14, 2008 Ord.: Dkt. No. 1630.)

B. The Parties' Initial Expert Disclosures

The Court set the deadline for Plaintiffs to disclose the identities, opinions, and supporting materials of their testifying experts on all issues other than damages for May 15, 2008 (Mar. 27, 2008 Ord. at 2: Dkt. No. 1658), with certain specific expert reports due slightly later (May 15, 2008 Ord. at 1-2: Dkt. No. 1706).² Plaintiffs served their initial non-damages expert reports and supporting materials on a staggered schedule in May 2008, with some materials arriving past due. (See, e.g., Aug. 8, 2008 Ord. at 2-4 discussing late-produced modeling information: Dkt. No. 1756.) In addition, Plaintiffs served numerous supplemental and "errata" reports from their non-damages experts, as outlined in the attached Exhibit 1.

In these reports and supplements, none of Plaintiffs' experts offered any opinion that the use of alum to treat of Lake Tenkiller would be a desirable, reasonable, or successful means of addressing phosphorus or algae levels in that lake. On the contrary, Plaintiffs' remedial alternatives expert Todd King specifically rejected the use of alum as an alternative in the IRW, both as to soil and to water. (King R. at 12, 16, 19: Dkt. No. 1876-16.) With regard to land application of alum he noted both that "the effectiveness of alum in immobilizing P in-situ to fields and pastures as found within the IRW has not been demonstrated on a large-scale basis,"

² The reports of Plaintiffs' experts Engel, Harwood, and Stevenson were due May 22, 2008, and the reports of Wells, Cooke, and Welch were due May 29, 2008. (May 15, 2008 Ord. at 1-2.)

and that “aluminum can potentially damage aquatic ecosystems and is potentially phytotoxic to plants at low pH.” (Id. at 12.) He similarly rejected the use of alum in rivers and streams:

Potential negatives associated with riverine alum application include the production of particulate floc that may cause siltation of aquatic habitats and fish gills and potential aquatic toxicity due to aluminum. Further, the P removal is short term and repeated applications would be required to provide P removal on an ongoing basis.

(Id. at 16.) Finally, King noted the similarly potentially harmful effects of lake application of alum, observing that because “in a reservoir, such as Lake Tenkiller, high dosages and repeated applications may be needed ... there is the potential for localized depression of pH with an associated potential increase in aluminum toxicity to aquatic life.” (Id. at 19.) At his deposition, Mr. King confirmed that he had not studied alum treatment as an alternative for remediating phosphorous. (King Dep. Vol. I at 93:4 – 94:18, Vol. II at 287:22 – 291:13: Ex. 2.)

Apart from Mr. King, none of Plaintiffs’ other experts provided any opinion regarding the feasibility or effectiveness of alum treatment. (Id. Vol. II at 288:9-12, 289:15 – 290:12.) In fact, Plaintiffs’ attorneys specifically instructed their modeling expert Scott Wells to cease any attempt to model alum treatment of the lake because of both timing and effectiveness concerns. (May 5, 2008 Email from D. Page to S. Wells: Ex. 3.)

The Court set a December 1, 2009 deadline for Defendants to disclose the identities, opinions, and supporting materials of Defendants’ testifying experts on non-damages issues, (Oct. 28, 2008 Ord. at 5: Dkt. No. 1787), again with certain discrete expert reports due slightly later.³ Defendants complied with those deadlines, serving expert reports with opinions generally

³ Under the Court’s November 21, 2008 Order, Defendants’ modeling and other fate-and-transport (causation) reports were due Jan. 23, 2009; drinking water quality and erosion reports were due Jan. 26, 2009; aquatic ecology and limnology and the reports of Sullivan, Horne,

(continued on next page)

responding to the opinions expressed by Plaintiffs' previously disclosed experts and their opinions. Because none of Plaintiffs' experts suggested that alum treatment was a viable remedy for any of the claimed problems in the IRW, none of Defendants' non-damages experts addressed the issue of alum treatment at that time.

C. Plaintiffs' Damages Expert Disclosures

On January 2, 2009, Plaintiffs disclosed the identities and reports of their damages experts. Among the reports Plaintiffs served on that date was a report from Stratus Consulting entitled "Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Lake Tenkiller." (Dkt. No. 1853-4.) In the report, Stratus describes a contingent valuation or CV survey it took to try to quantify economic values connected with the natural resource damages at issue in this case. In conducting the survey, interviewers first met in person with survey respondents and "educated" them about Plaintiffs' version of the nature and origins of phosphorus conditions in the IRW:

The Problem: The survey narrative described the Illinois River system, including Tenkiller Lake, and explained how water quality, the ecosystem, and aesthetics have changed since around 1960. Then, it explained that these changes have come about because spreading of poultry waste and other human activities have introduced large amounts of phosphorus into the watershed, which in turn has resulted in excess algae. Next, participants were informed that the State of Oklahoma has asked for an injunction that would ban all future spreading of poultry waste in the basin. It was pointed out that even after a ban is in place, runoff and leachate of large amounts of phosphorus remaining on the land from past spreading would continue to affect the waterways. Therefore, compared with conditions around 1960, algae would continue to be excessive in the river and lake for many years (Engel, 2008a, 2008b, 2008c).

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Connolly, and Chadwick were due Jan. 30, 2009. (Dkt. No. 1805.) Also, Defendants' final report on spring sampling is due May 30, 2009. (Aug. 8, 2008 Ord. at 5: Dkt. No. 1756.)

(Dkt. No. 1853-4 at Pages 1-7.) The interviewer then suggested to the respondent that the “problem” could be more quickly “solved” through the use of an alum treatment program, a method “successfully used” in “many states”:

The Solution: The solution introduced in the survey was a program to treat land and waters in the Illinois River watershed with alum, a substance that bonds with phosphorus and makes it unavailable to plants, including algae. The survey noted that many states have successfully used a similar program to reduce algae.⁵ The survey narrative explained that with alum treatments, it would take about 10 years for the river and 20 years for the lake to return to 1960 conditions, compared with 50 and 60 years, respectively, if alum was not applied. Hence, alum treatments would reduce the period over which the injuries would be present by 40 years for both the river and lake. Respondents were told that if alum treatments were implemented, the cost would be a one-time tax added to their state income tax bill next year.

⁵ Discussion of alum treatments of lakes and citations to the literature on the topic can be found in Cooke et al. (2005).

(Id., footnote in original.) The proposed alum treatment is also described and discussed repeatedly in the remainder of the CV survey report, perhaps most extensively in Section 6, “Distribution of Voting and Tests of Validity.” (Id. at Pages 6-1 through 6-43.)

According to the Stratus report, Plaintiffs’ experts’ interviewers told survey respondents:

- Poultry litter accounts for 60% of the phosphorous loading in the IRW;
- The State is taking action to reduce phosphorous by improving sewage treatment plants and enforcing new fertilizer rules;
- The State has asked the Court for an injunction to stop poultry litter application;
- Alum treatment of the land, river, and lake would reduce excess phosphorous faster than natural processes;
- The alum treatment will only work if the Court bans poultry litter application;

- Returning conditions to those in 1960 would take 10 years for the Illinois River and 20 years for Lake Tenkiller with alum treatment, compared to 50 years for the river and 60 years for the lake without alum;⁴
- Alum does not harm humans and is used in many products and by water treatment plants;
- Alum bonds to phosphorous causing the formation of heavy particles that sink;
- The United States Army Corps of Engineers would work with the Oklahoma Department of Environmental Quality to spread alum. Alum would be spread on land by trucks and on water by special boats. Alum dispensers would be placed near the border with Arkansas to spread alum when water sensors detect high phosphorous concentrations;
- Alum has been used successfully and safely in many states to reduce algae;
- Alum application would have some negative effects, specifically:
 - white powder will remain on the land until rainfall;
 - the water will be cloudy for a few hours after application; and
 - the water will taste bitter for the first hour after application;
- Alum treatment will be needed for five years to remove all excess phosphorous; and
- Alum treatment would result in a one-time tax. The information provided about the *amount* of the tax varied randomly among respondents.

(Id. at Pages 4-14 to 4-27.) Importantly, the CV study makes clear that respondents’ willingness to support the proposed alum treatment – and therefore a substantial damages award against Defendants – correlated strongly to each respondent’s level of acceptance of the efficacy of the proposed alum treatment. (Id. at Pages 6-7).

Neither the Stratus Report nor any of Plaintiffs’ other damages expert reports offers any scientific analysis of or justification for the use of an alum treatment in Lake Tenkiller or the

⁴ Interestingly, in an earlier scope survey, Plaintiffs’ interviewers told participants that “alum treatments were not needed for the river, which would return to 1960 conditions in about 10 years on its own, simply as a result of the ban of future spreading of poultry waste.” (Dkt. No. 1853-4 § 3.7.

IRW, for the selection of 1960 as a benchmark, or for any of the other representations Stratus made to its survey respondents.

Since serving the report, Plaintiffs' attorneys have also raised the issue of alum treatment at the depositions of Defendants' experts. For example, at the March 26, 2009 deposition of Defendants' expert Dr. Brian Murphy, Plaintiffs' attorney David Page introduced and questioned the witness extensively about an article concerning alum treatment effectiveness in the IRW, specifically "Decreasing Metal Runoff from Poultry Litter with Aluminum Sulfate," by P.A. Moore, Jr., et al, J. Environ. Qual. Vol. 27 at 92 (Jan-Feb 1998). (See B. Murphy Dep. Vol. II at 30:6 – 45:2 (Mar. 26, 2009, rough tr.): Ex. 4.)

ARGUMENT

Defendants urge the Court to strike those portions of Plaintiffs' damages experts' disclosures that rely on representations or assumptions about alum treatments of Lake Tenkiller or any other part of the IRW. These would include (but would not be limited to) any results, opinions, and conclusions of the CV survey portion of the Stratus report based on the purported plan for alum treatment.

The CV survey portion of the Stratus report rests entirely on Plaintiffs' experts' agents' representations to survey respondents that an alum treatment would greatly speed "recovery" of the IRW from excess phosphorus that Plaintiffs attribute to poultry litter. (Dkt. No. 1853-4 at Pages 1-7.) If Plaintiffs intend to claim at trial that these and other representations concerning alum treatment are scientifically accurate and that they intend to use alum treatment as a remedial measure, the Court should strike all evidence relating to alum treatment (including the CV survey results) since Plaintiffs failed to timely disclose any expert opinions concerning such a treatment, the details of any treatment program, or the likely effects that such treatment would

have on Lake Tenkiller or the IRW, and did not produce any supporting materials relating to such opinions.

If, on the other hand, Plaintiffs concede that their representations about the effects of alum treatment are *not* scientifically accurate (or at least that they will not claim at trial that the effects are accurate) or that they do not actually intend to use alum treatment on Lake Tenkiller or elsewhere in the IRW, the Court should strike the CV survey and any other alum-treatment-based evidence because it is irrelevant to the issues in the case and lacks foundation. Either way, Defendants should not have to respond to an expert opinion that is either inexcusably late or simply fictional.⁵

⁵ Plaintiffs are coy as to their intentions. Their CV survey rests entirely on a proposed alum treatment program. As the Stratus report recounts,

[t]he survey narrative explained that with alum treatments, it would take about 10 years for the river and 20 years for the lake to return to 1960 conditions, compared with 50 and 60 years, respectively, if alum was not applied. Hence, alum treatments would reduce the period over which the injuries would be present by 40 years for both the river and lake.

(Dkt. No. 1853-4 at Pages 1-7.) Yet, having assured survey participants that this alum program, without regard to any other source of nutrients in the IRW, could restore the IRW to “1960 conditions” within 10 to 20 years, the Stratus Report also notes that “the State is not actually proposing this specific alum treatment program at this time.” (*Id.*)

The King report similarly equivocated. While it rejected alum treatment for fields and streams, with regard to Lake Tenkiller it concluded that “the applicability of P inactivation with alum cannot be adequately evaluated until the final remedial measures for the watershed and riverine response regions have been identified in sufficient detail to determine future P and nutrient loadings to Lake Tenkiller.” (Dkt. No. 1876-16 at 19.) Plaintiffs have thus hidden the ball with regard to their intentions as to alum. What is clear, however, is that no alum treatment program was proposed as part of Plaintiffs’ remedial expert work, and no grounds were provided at any point to provide a scientific basis for the CV survey report.

Finally, even if Plaintiffs' introduction of the proposed alum treatment in the Stratus CV survey report were not inexplicably late, it is woefully incomplete as an expert report under Rule 26(a)(2), and the Court should strike it on that ground.

Out of an abundance of caution, Defendants have asked their environmental experts to review and evaluate the limited information about the alum treatment program described in the Stratus report. Based on that evaluation, Defendants have produced to Plaintiffs, contemporaneous with the filing of this motion, a report and opinions describing a number of significant problems with such a treatment program under the circumstances presented here.

Nevertheless, Plaintiffs' belated disclosure of this proposed alum treatment remedy—without any analysis, scientific justification, proof of likely effectiveness, or supporting materials—flies in the face of the Court's deadlines and Orders, and Defendants respectfully submit that striking these new opinions and the survey that depends on them is the only appropriate remedy. This is in part an evidentiary motion, and for that reason Defendants considered delaying this motion until closer to trial. However, the combination of the clear untimeliness of Plaintiffs' disclosure, the patent inadequacy of that disclosure, and the enormous amount of work that Defendants and their experts would need to put in between now and trial to prepare to meet and counter these belated disclosures prompted Defendants to request relief now.

I. If Plaintiffs Intend to Prove the Effectiveness of Alum Treatment, Their Disclosure Comes Too Late, and the Court Should Strike It.

If Plaintiffs intend to call an expert witness at trial to testify that alum treatment would be a scientifically based or viable method of addressing natural resource damages, they did not timely disclose that expert opinion, and the Court should strike the CV survey report that relies on that premise. See Fed. R. Civ. P. 37(c) (1). As discussed above, none of Plaintiffs' timely-disclosed non-damages expert disclosures either suggested alum as a method of treating excess

phosphorus in the watershed or offered any scientific basis for such a treatment method. Indeed, Plaintiffs' remedial alternatives expert expressly rejected application of alum to fields and streams because of negative impacts on crop growth and risks to aquatic life (King R. at 12, 16, 19; Dkt. No. 1876-16; Ex. 2 at 93:4-94:18, 287:22-291:13), and Plaintiffs' attorneys instructed their modeling expert *not* to model alum treatment of Lake Tenkiller both because it would take too much time and due to concerns over the effectiveness of any such treatment (Ex. 3).

The Court recently and unambiguously rejected Plaintiffs' requests to introduce more non-damages expert opinions in this matter, denying Plaintiffs' requests to serve additional rebuttal and supplemental expert reports for several of their non-damages experts. (See Jan. 29, 2009 Orders: Dkt. Nos. 1839, 1842.) In denying Plaintiffs' motion to serve an additional supplemental expert report by Drs. Cooke and Welch, the Court detailed the numerous extensions that Plaintiffs had already enjoyed in this case (Dkt. No. 1839 at 1-2), and discussed the 14 supplemental and "errata" reports that Plaintiffs had at that time already served after those extended disclosure deadlines (see id. at 2). The Court's Order made clear its view that permitting new expert reports "at this late date would unduly increase the cost of this litigation and delay its ultimate resolution." (Jan. 29, 2009 Ord at 2: Dkt. No. 1842.)

The Court should likewise reject Plaintiffs' effort to belatedly introduce the issue of alum treatment into its expert case. Plaintiffs' disclosure of their proposed alum treatment method plainly comes many months after the deadline for non-damages expert disclosures. Indeed, the grounds to strike the new alum treatment opinions and the survey that relies on them is even more compelling than the grounds on which the Court denied Plaintiffs' leave to serve supplemental and rebuttal reports. With the supplemental and rebuttal reports, Plaintiffs openly sought the Court's permission to serve those opinions out of time. Here, Plaintiffs simply

inserted the non-damages opinions concerning alum into a damages expert report without even seeking permission.

In other words, Plaintiffs have tried to do just what Defendants anticipated in opposing Plaintiffs' proposed change to a "relief-related" expert deadline: they have offered a new remedial alternative under the guise of an expert "damages" report. (See Defs.' Resp. in Opp'n to Pls.' Mot. to Reconsider Am. Sched. Ord. at 6: Dkt. No. 1422 (quoted *supra* at 4); see also Nov. 6, 2007 Hrg. Tr.: Dkt. No. 1387 at 176:5 – 177:5: "If that language is employed,... does that mean [Plaintiffs] can produce a natural resource damage assessment or remediation plan [at the later expert deadline] and we have a month to respond?"). Moreover, they did so despite having expressly rejected the particular remedial alternative as part of their non-damages expert disclosures. The Court flatly rejected Plaintiffs' attempts to change the Scheduling Order language to permit Plaintiffs to spring this sort of 11th hour surprise (Jan. 15, 2008 Ord. at 2: Dkt. No. 1459; Mar. 14, 2008 Ord. at 2: Dkt. No. 1630), and the Court should reject Plaintiffs' attempt to slip just such a surprise into the Stratus report in defiance of the Court's Orders.

The Court should strike any expert opinions offered by Plaintiffs concerning alum treatment, along with the CV survey report that relies on it, and should bar any reference to either at trial.

II. If Plaintiffs Do Not Intend to Prove the Effectiveness of Alum Treatment, Their CV Survey Is Based on Fiction, and the Court Should Strike It.

If, on the other hand, Plaintiffs do *not* intend to demonstrate at trial any scientific basis for the proposed alum treatment or to offer evidence suggesting that it would be effective, the Court should strike the alum treatment opinions and the survey that depends on them as irrelevant and without foundation.

To be admissible, expert testimony must reflect “scientific knowledge,” must be “derived by the scientific method,” and must in the end be “good science.” Daubert v. Merrell Dow Pharms. 509 U.S. 579, 590 (1993)). This standard requires the Court to make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Id. at 592-93. The offering party bears the burden of demonstrating admissibility. E.g., Student Mktg. Group, Inc. v. College P’ship, 247 Fed. Appx. 90, 101 (10th Cir. 2007) (citing Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 970 n.4 (10th Cir. 2001)).

If Plaintiffs do *not* intend to offer any scientifically based evidence concerning alum treatment at trial, the Court’s task is simplified considerably. The alum treatment itself is clearly inadmissible, lacking any offer of scientific evidence to support it and having been expressly rejected by Plaintiffs’ own remedial expert. Further, absent a scientific foundation for the alum treatment, the portion of the CV survey report based on the alum treatment likewise fails under Daubert. Although an expert witness may base an expert opinion on evidence presented by other witnesses at trial, see, e.g., Am. Booksellers Ass’n v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031, 1038 (N.D. Cal. 2001), “[a]n expert’s opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record.” Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1995) (citing E. Auto Distribs., Inc. v. Peugeot Motors of Am., 795 F.2d 329, 337 (4th Cir. 1986)). Likewise, “[o]pinions derived from erroneous data are appropriately excluded.” United States v. City of Miami, 115 F.3d 870, 873 (11th Cir. 1997); see also Slaughter v. S. Talc Co., 919 F.2d 304, 307 (5th Cir. 1990).

Here, Plaintiffs’ entire CV survey rests on the premise that the State will use alum treatments to address claimed damages to natural resources. As noted above, survey

participants' responses correlated to their belief in the effectiveness of this treatment. (Dkt. No. 1853-4 at Pages 6-7.) And, as Defendants' damages reports will demonstrate, there are substantial concerns and difficulties with regard to such a treatment program that, if shared with survey participants, would likely have substantially altered their view of the program. If Plaintiffs do not in fact intend to use such alum treatment or to prove at trial that such treatment would be justified and effective, Plaintiffs' experts' opinions on alum treatment and all survey results that depend on those opinions rest on unproven and erroneous facts. Thus, the Court should strike them.

III. Plaintiffs' Disclosure of Their Alum Treatment Does Not Comply with Rule 26's Expert Disclosure Requirements, and the Court Should Strike It.

Finally, even assuming for the sake of argument that Plaintiffs *had* timely produced the opinions concerning the alum treatment of Lake Tenkiller that appear in the Stratus report, the Court should nevertheless strike those opinions and the survey results that rely on them because the disclosure regarding alum treatment in the Stratus report fails to meet the requirements for expert disclosure set out in Federal Rule of Civil Procedure 26(a)(2).

Rule 26(a)(2) provides in relevant part:

Disclosure of Expert Testimony.

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the data or other information considered by the witness in forming them;

- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

Here, Plaintiffs' disclosure of the alum treatment proposal in the Stratus report falls far short of compliance with a number of these requirements. The report does not identify the witness(es) whom Plaintiffs intend to call to testify about the alum program. It does not provide any information that would qualify any individual to testify on the subject of alum treatment.⁶ It provides only the most conclusory of opinions about the proposed alum treatment itself and does not provide "the basis or reasons" for those opinions. Finally, other than a single general footnoted citation to a 2005 textbook,⁷ the report neither identifies nor provides any data or information considered by whatever expert intends to testify to the alum treatment opinion.

These omissions justify striking both the opinions in the Stratus report concerning alum treatment and the CV survey that depends on them. "The failure to provide an expert report that satisfies the specific requirements of Rule 26(a)(2)(B) undermines opposing counsel's ability to prepare for trial." Pena-Crespo v. Puerto Rico, 408 F.3d 10, 13 (1st Cir. 2005). As a result, "[i]f a party fails to provide information ... required by Rule 26(a) ... the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure

⁶ A brief review of the qualifications of the seven listed authors of the Stratus report shows expertise in economics and psychology but not in aquatic science of any kind. (See Dkt. No. 1853-4 § 1.1.)

⁷ See Dkt No. 1853-4 at Page 1-7, n.5: "Discussions of alum treatments of lakes and citations to the literature on the topic can be found in Cooke, et al., 2005 [G. D., E.B. Welch, S.A. Peterson, and S. A. Nichols, 2005, *Restoration and Management of Lakes and Reservoirs* Third Edition. Taylor and Francis, Boca Raton, FL]."

was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Plaintiffs offer no justification for the omission of the alum treatment opinions and supporting materials from the initial disclosures where they belonged, and cannot tenably argue that the omission was harmless. The Court should strike those portions of the Stratus report that recite or depend on opinions about alum treatment.

CONCLUSION

For the reasons set forth above, Defendants urge the Court to strike from Plaintiffs’ damages experts’ disclosures any and all results, opinions, and conclusions based on representations or assumptions about alum treatments of Lake Tenkiller or any portion of the IRW, including but not limited to the CV survey portion of the Stratus report.

Dated: March 31, 2009

Respectfully submitted,

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

BY: s/ John H. Tucker
JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
LESLIE J. SOUTHERLAND, OBA #12491
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173
(918) 592-3390 Facsimile

And

DELMAR R. EHRLICH
BRUCE JONES
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000
(612) 766-1600 Facsimile
**ATTORNEYS FOR CARGILL, INC. AND CARGILL
TURKEY PRODUCTION LLC**

BY: /s/ Michael Bond
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
MICHAEL BOND, AR Bar No. 2003114
ERIN WALKER THOMPSON, AR Bar No.
2005250

DUSTIN DARST, AR Bar No. 2008141
KUTAK ROCK LLP
234 East Millsap Road Suite 400
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-AND-

STEPHEN L. JANTZEN, OBA No. 16247
PATRICK M. RYAN, OBA No. 7864
PAULA M. BUCHWALD, OBA No. 20464
RYAN, WIALEY & COLDIRON, P.C.
119 N. Robinson

900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
E-Mail: sjantzen@ryanwhaley.com

-AND

THOMAS C. GREEN
MARK D. HOPSON
TIMOTHY K. WEBSTER
JAY T. JORGENSEN
GORDON D. TODD

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
A. SCOTT MCDANIEL, OBA 16460
NICOLE LONGWELL, OBA 18771
PHILIP D. HIXON, OBA 19121
McDaniel, Hixon, Longwell & Acord, PLLC
320 S. Boston Avenue, Suite 700
Tulsa, OK 74103
-AND-
SHERRY P. BARTLEY, AR BAR #79009
MITCHELL WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
**ATTORNEYS FOR PETERSON FARMS,
INC.**

BY: /s/ R. Thomas Lay
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
R. THOMAS LAY, OBA #5297
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
-AND-
JENNIFER S. GRIFFIN
LATHROP & GAGE, L.C.
314 East High Street
Jefferson City, MO 65101
**ATTORNEYS FOR WILLOW BROOK
FOODS, INC.**

BY: /s/ Randall E. Rose
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
RANDALL E. ROSE, OBA #7753
GEORGE W. OWENS, ESQ.
OWENS LAW F P.C.
234W. 13 Street
Tulsa, OK 74119
-AND-
JAMES MARTIN GRAVES, ESQ.
GARY V. WEEKS, ESQ.
BASSETT LAW FIRM
POB 3618
Fayetteville, AR 72702-3618
**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/John R. Elrod
(SIGNED BY FILING ATTORNEY WITH
PERMISSION)
JOHN R. ELROD
VICKI BRONSON, OBA #20574
BRUCE WAYNE FREEMAN
CONNER & WINTERS, L.L.P.
100 W. Central Street, Suite 200
Fayetteville, AR 72701
**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

ROBERT P. REDEMANN, OBA #7454

LAWRENCE W. ZERINGUE, ESQ.

DAVID C. SENGER, OBA #18830

PERRINE, MCGIVERN, REDEMANN, REID,

BARRY & TAYLOR, P.L.L.C.

Post Office Box 1710

Tulsa, OK 74101-1710

-AND-

ROBERT E. SANDERS

STEPHEN WILLIAMS

YOUNG, WILLIAMS, HENDERSON &

FUSILIER

Post Office Box 23059

Jackson, MS 39225-3059

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

CERTIFICATE OF SERVICE

I certify that on the 31st day of March, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General
J. Trevor Hammons, Assistant Attorney General
Daniel Lennington, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us
trevor_hammons@oag.state.ok.us
Daniel.lennington@oag.ok.gov

Melvin David Riggs
Joseph P. Lennart
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
David P. Page
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
J. Randall Miller
Miller Keffer & Bullock Pedigo LLC

lbullock@mkblaw.net
rmiller@mkblaw.net

William H. Narwold
Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Fidelma L Fitzpatrick
Motley Rice LLC

bnarwold@motleyrice.com
lward@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com
cxidis@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Paula M. Buchwald
Patrick Michael Ryan
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Sidley Austin LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com

L Bryan Burns
Robert W. George

bryan.burns@tyson.com
robert.george@tyson.com

Michael R. Bond
Erin W. Thompson
Dustin R. Darst
Kutack Rock LLP

michael.bond@kutackrock.com
erin.thompson@kutackrock.com
dustin.dartst@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;
AND COBB-VANTRESS, INC.**

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Bassett Law Firm

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
P. Joshua Wisley
Conner & Winters, LLLP

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Craig Mirkes
McDaniel, Hixon, Longwell & Acord, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

Michael D. Graves

mgraves@hallestill.com

Dale Kenyon Williams, Jr.

kwilliams@hallestill.com

COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green

Sidley Austin Brown & Wood LLP

1501 K Street NW

Washington, DC 20005

**COUNSEL FOR TYSON FOODS,
INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC.; AND
COBB-VANTRESS, INC.**

s/ John H. Tucker